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31 **UNITED STATES DISTRICT COURT**
32 **NORTHERN DISTRICT OF CALIFORNIA**

33 CHASOM BROWN, WILLIAM BYATT,
34 JEREMY DAVIS, CHRISTOPHER
35 CASTILLO, and MONIQUE TRUJILLO
36 individually and on behalf of all others
37 similarly situated,

38 Plaintiffs,

39 v.

40 GOOGLE LLC,

41 Defendant.

42 Case No.: 4:20-cv-03664-YGR-SVK

43 **[PROPOSED] ORDER GRANTING**
44 **MOTION TO STRIKE NON-RETAINED**
45 **EXPERT DECLARATIONS FOR WHOM**
46 **GOOGLE PROVIDED NO EXPERT**
47 **REPORT**

48 Judge: Hon. Yvonne Gonzalez Rogers

49 Date: September 27, 2022

50 Time: 2:00 p.m.

51 Location: Courtroom 1 – 4th Floor

1 Before the Court is Plaintiffs' motion to strike the declarations of Google's non-retained
 2 employee-experts George Levitte, Glenn Berntson, Steve Ganem, and Jonathan McPhie, filed
 3 with Google's opposition to Plaintiffs' motion for class certification at Dkts. 666-19 (Levitte),
 4 666-18 (Berntson), 666-17 (Ganem), and 666-12 (McPhie) (the "Motion to Strike").

5 Under this Court's Standing Order in Civil Cases, *all* expert witnesses—"whether
 6 *retained or non-retained*"—"must provide written reports in compliance with Federal Rule of
 7 Civil Procedure 26(a)(2)(B)." Dkt. 392 ¶ 10 (emphasis added). On February 11, 2022, the Court
 8 reminded the parties that this order was in effect and must be followed. Feb. 11, 2022 Hr'g Tr.
 9 at 11:13-14. And on March 22, 2022, the Court issued a Case Management and Pretrial Order
 10 making clear that the deadlines for expert reports under Rule 26(a)(2)(B) applied to "All Experts,
 11 Retained *and Non-Retained*." Dkt. 465 at 1 (emphasis added).

12 Despite the Court's clear and unambiguous orders and instructions, Google improperly
 13 attached to its opposition to class certification declarations from four non-retained employee-
 14 experts who never submitted any expert report. Those four declarations very clearly fall within
 15 the scope of the Court's Standing Order:

- 16 • **George Levitte:** Mr. Levitte declares himself "a *subject matter expert* for all
 17 ad monetization features of Ad Manager" and then proceeds to offer various
 18 expert opinions which Google uses to rebut Plaintiffs' expert Mr. Lasinski's
 unjust enrichment and apportionment opinions. Dkt. 666-12 ¶ 2 (emphasis
 added).
- 19 • **Glenn Berntson:** Dr. Berntson expressly seeks to *rebut Plaintiffs' technical
 20 expert Mr. Hochman*, purporting to "address some errors and false assumptions
 21 made in Mr. Jonathan Hochman's expert report, submitted in this case,"
 including with respect to Dr. Berntson's opinions about the "reliability" of
 22 Google's "maybe_chrome_incognito" detection bit. Dkt. 666-17 ¶¶ 1, 41
 (emphasis added).
- 23 • **Steve Ganem:** Mr. Ganem also presents himself as an expert, providing
 24 technical opinions regarding Google's data and data systems and opining, for
 example, that it would be "impossible" to make specific revenue and profits
 calculations using Google's data. Dkt. 666 Ex. 18 ¶ 36.
- 25 • **Jonathan McPhie:** Mr. McPhie also offers expert testimony, as shown by his
 26 repeated use of "I am informed" to introduce his opinions, including for
 example regarding how "Incognito provides privacy" and then opining that
 27 "Google's disclosures about Incognito mode, and private browsing generally,

1 are *consistent with the features I am informed Incognito mode provides.*” Dkt.
2 666-19 ¶¶ 3-5, 72 (emphasis added).

3 “[T]he testimony [Google] seek[s] to offer . . . is excluded on the grounds that [Google]
4 failed to disclose these experts timely or provide full expert reports as required by Federal Rule
5 of Civil Procedure 26(a)(2).” *Trulove v. D’Amico*, 2018 WL 1090248, at *2 (N.D. Cal. Feb. 27,
6 2018) (Gonzalez Rogers, J.) (quoting Fed. R. Civ. P. 26(a)(2)(C)) (excluding unretained experts
7 for failing to provide expert disclosures required by Rule 26(a), explaining that exclusion is “self-
executing” and “automatic” under Rule 37(c)(1)).

8
9 It is therefore

10 **ORDERED, ADJUDGED, and DECREED:**

11 1. The Court **GRANTS** Plaintiffs’ Motion to Strike.
12 2. The Court strikes the following Google-employee expert declarations filed with
13 Google’s opposition to Plaintiffs’ motion for class certification: George Levitte (Dkt.
14 666-19), Glenn Berntson (666-18), Steve Ganem (666-17), and Jonathan McPhie
15 (Dkt. 666-12).

16
17 **IT IS SO ORDERED.**

18
19 Dated: _____

20 _____
21 The Honorable Yvonne Gonzalez Rogers
22 United States District Judge
23
24
25
26
27
28